No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

The appellants' statement of facts in connection with their contention that the trial court had no jurisdiction of this cause is correct as far as it goes, but appellants fail to mention that after the cause had been transferred from the State court to the United States District Court they made no motion to remand the cause to the State court, nor did they at any time thereafter make any objections to any of the proceedings in the United States District Court. The appellants proceeded to trial in the United States District Court without making any objection, and they did not even make any contention as to the jurisdiction of the court when they moved for a new trial. *The contention is made for the first time on this*

appeal. As will be discussed more fully hereinafter, it is the position of the appellee that this contention of the appellants cannot be sustained at this late stage in the proceedings.

We find ourselves unable to accept appellants' statement of the facts pertaining to the manner in which the accident occurred. We shall set forth hereinafter evidence which fully supports the findings of fact, conclusions of law, and judgment in this case.

The United States District Court Had Jurisdiction to Render Judgment in This Case, and the Appellants Are Estopped From Complaining for the First Time on Appeal That This Cause Was Improperly Removed From the State Court to the United States District Court, No Motion to Remand Having Been Made, and No Objections Having Been Made in the Trial Court.

It is true, as the appellants state, at page 8 of their opening brief, that the appellee instituted this action in the State court to recover the sum of $6150.00, and that it was not until after a cross-complaint had been filed in that court against appellee that the appellee sought and obtained removal of this cause to the United States District Court, upon the grounds that there was diversity of citizenship and that the amount prayed for in the cross-complaint was in excess of the jurisdictional sum of $3,000.00. If the appellants had moved in the United States District Court to remand the cause to the State Court, the case of *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, would be applicable, because in that case the appellant had promptly moved in the United States District Court to remand the cause

to the State court, and the United States Supreme Court held that the motion to remand should have been granted.

However, in the case at bar the appellants made no effort to have the case remanded to the State court, nor did they at any time make any objections whatsoever to any of the proceedings in the United States District Court. They proceeded to trial without objection, and even made a motion for new trial without mentioning any contention that the case had been improperly removed to the United States District Court. It is on this appeal that the appellants for the first time raise the point that the cause was not properly removed to the United States District Court. Therefore, we respectfully submit that the case of Shamrock Oil and Gas Corp. v. Sheets (supra) is not applicable to the facts of this case, the appellants herein having waived the right to raise the point and being estopped from doing so at this late stage in the proceedings.

Jurisdiction of the District Court is now for the first time challenged by the appellants. There is, however, no jurisdictional question involved in this case. *At most, there was a mere irregularity which could have been cured by a motion to remand.* The District Court had before it a controversy between citizens of different states, with each party seeking to recover a sum of money in excess of the jurisdictional minimum of $3000.00, hence it certainly had jurisdiction of the *subject matter,* and of course the matter of jurisdiction over the *person* of the parties was something which could be, and was, waived by the parties by voluntarily submitting themselves to the jurisdiction of the court. The appellants were perfectly willing to submit the case to the trial judge for decision, and they made no objection to the court exercising jurisdiction over

them. The irregularity, if any, in the method of getting the parties before the District Court did not operate to deprive that court of jurisdiction over the *subject matter* or the *parties. By failing to move to remand the cause to the State Court, the appellants waived any irregularity which might have been committed in the removal of the cause to the United States District Court, and even if there was irregularity in removal of the cause, the fact remains that the cause was removed to the District Court, and that court was requested by all parties to the action to proceed to render judgment therein. Inasmuch as removal proceedings are in the nature of process to bring the parties before the District Court, it naturally follows that where the District Court is presented with a cause involving the requisite diversity of citizenship and amount involved, and all of the parties voluntarily appear and submit themselves to the jurisdiction of the court and proceed to trial without objection, the court has jurisdiction of the cause and of the parties and will not, of its own motion, inquire into the regularity of the manner in which the cause came before the court.*

Mackay v. Uinta Co., 229 U. S. 173 (May 26, 1913).

Removal is a Federal question, under a Federal statute, and a motion to remand is the proper and usual method of testing the sufficiency and regularity of removal proceedings. Organic power to hear the controversy existed in the case at bar, and it is immaterial how the parties got into court; it is sufficient that they did come before the court and submit their controversy to it for decision, without raising any objection or making any attempt to prevent the court from deciding the case upon its merits. In

this case we have a situation where removal of the cause became an accomplished *fact,* and the appellants failed to exercise their right to have the cause remanded to the State court and permitted the District Court to try the case and render judgment without objection from them.

The situation in this case is the same as if each of these parties had originally filed their respective actions in the United States District Court, which could have been done in this instance because of the diversity of citizenship and the large amount of money prayed for by each of the parties. Certainly, neither party would then have contended that said court would not have jurisdiction, and it becomes apparent that the jurisdictional elements likewise existed in this case whether or not the case was irregularly brought into the United States District Court.

Having failed to move to remand the cause to the State court, and having proceeded to trial in the United States District Court, without protest, the appellants certainly acquiesced in the jurisdiction of the United States District Court over their *persons* so as to forfeit their privilege to have the case remanded to the State court. The appellants now ask this court on appeal, for the first time, to do of its own motion what they should have requested of the District Court, promptly upon removal of the case to the District Court, to-wit, to remand this case to the State court. Inasmuch as the appellants did not see fit to move to remand the case to the State court and did not make any objections whatsoever on this score until they filed their opening brief herein, there is of course no ruling of the trial court to review, because no ruling was requested or made in this connection.

We respectfully submit that the authorities are uniform to the effect that under such circumstances the District Court was entitled to proceed to render judgment, and that the appellants, disappointed in the judgment and raising the point for the first time on appeal, have waived the right to have the cause remanded to the State court.

The leading case on this question is that of *Mackay v. Uinta Development Company,* 229 U. S. 173, decided by the United States Supreme Court on May 26, 1913. In that case the Uinta Development Company, a Wyoming corporation, brought an action in the state court in Wyoming against Mackay, a Utah citizen, to recover $1,950 damages. In an amended answer filed by Mackay, a counter-claim for $3,000 damages was set up, and although Mackay's time to plead to the original complaint had expired, he then filed a petition to remove the case to the United States Circuit Court for the district of Wyoming, and an order of removal was granted on the theory that the parties were citizens of different states, that the amount in dispute as disclosed by the counter-claim exceeded $2,000 and that the construction of Federal statutes was necessarily involved in the dispute. The transcript of the record was subsequently filed in the United States Court, and both parties appeared therein. The plaintiff filed in the United States Court a reply to the counter-claim, and the case was subsequently tried in said court and judgment was entered in favor of the Uinta Development Company, whereupon Mackay, disappointed at the outcome of the case, took an appeal, but on appeal neither

party raised any question as to the power of the trial court to determine the cause. The Circuit Court of Appeals, however, certified to the United States Supreme Court the following question (page 175):

> "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?"

In answer to this question, the United States Supreme Court said (pages 175-177):

> "This question must be answered in the affirmative and that fact makes it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-

claim for $3,000, acquire the right to remove the case to the United States court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.

"Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, *on motion of the proper person,* at the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. Powers v. C. & O. Ry., 169 U. S. 92, 98.

"What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different states in which the amount claimed by one non-resident was more than $2,000. exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties

> could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irregularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause."

In the case of *Lopata v. Handler,* 121 Fed. (2d) 938, where it was contended that the Circuit Court of Appeals should reverse the judgment with directions to remand the case to the state court because the action was not one which was properly removable to the United States District Court, inasmuch as certain individual defendants were residents of the State of Oklahoma where the action was originally instituted and there was not a separable controversy between the plaintiffs and the other defendants, the Circuit Court of Appeals for the Tenth Circuit held, on July 24, 1941, that the plaintiffs had waived the right to have a remand of the cause to the State court.

As in the case at bar, the question of remand was raised for the first time on appeal, and the parties proceeded to trial on the merits. The action was one which could have been brought originally in the United States District Court. The Circuit Court of Appeals said (page 940):

> "Where a suit is one of which a federal court may take jurisdiction, that is, a case which the plaintiff might properly bring in a federal court, and the defendant procures its removal from a state court, although such removal is wholly unauthorized, and the plaintiff acquiesces in such removal, the federal court acquires jurisdiction.

"Here, counsel for the plaintiffs affirmatively stated in open court that they would not seek to have the cause remanded, proceeded to trial on the merits, and thus waived the right to have the cause remanded.

"The motion to reverse with directions to remand the action to the state court is denied."

In the case of *Fienup v. Kleinman,* 5 Fed. (2d) 137, where the plaintiff commenced an action in a state court against a citizen of that state and against a citizen of another state who caused the case to be removed to the Federal court, and the plaintiff subsequently asked for and obtained from the Federal court an injunction against the defendants, without making any special appearance in the Federal court or making any objections to the jurisdiction of the Federal court, but subsequently moved to remand the case to the state court, the Circuit Court of Appeals for the Eighth Circuit held that the order denying his motion to remand the case to the state court should be sustained, and that the Federal court had jurisdiction of the case. The Circuit Court of Appeals said (page 139):

"It was not until after the plaintiff had procured this injunction from the federal court below, nor until more than eight months after the order of removal of this case to that court was made, and on April 24, 1920, that Mr. Fienup made his motion to remand this case to the state court. Never prior to that day had he made any objection to the jurisdiction of the federal court below; never had he made any special appearance therein. Meanwhile he had applied to that court for and obtained from it an order for an injunction. That application was

> a general appearance by him in that court, and an invocation of the exercise by that court of its general jurisdiction on his behalf, and with his long delay constituted a complete waiver of his right or privilege, if he ever had any, to a remand of this case to the state court and conclusively estopped him from obtaining such relief. 1 Foster Federal Practice (5th Ed.) p. 195, sec. 61; In re Moore, 209 U. S. 490, 496, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Corwin Mfg. Co. v. Henrici Washer Co. (C. C.) 151 F. 938; Philadelphia & Boston Face Brick Co. v. Warford (C. C.), 123 F. 843."

In the case of *Handley-Mack Co. v. Godchaux Sugar Co., 2* Fed. (2d) 435, where a New York corporation brought an action in the state court of Tennessee against a Tennessee corporation, and the defendant caused the case to be removed to the United States District Court, but the plaintiff made no motion to remand the case to the state court, the Circuit Court of Appeals for the Sixth Circuit held that, although the defendant, being a resident of Tennessee, was not entitled to remove the case to the federal court, the court had jurisdiction to render judgment, and the Circuit Court of Appeals affirmed the judgment. The Circuit Court of Appeals said (pages 436, 437):

> "The subject-matter of the instant suit was thus within the original jurisdiction of the District Court. Defendant's counsel says he had at the time doubt of defendant's right to remove, and that plaintiff's counsel thought the right existed. The latter says that on receipt of the notice of removal he suggested to opposing counsel that defendant was not entitled to remove, but that he would not oppose removal because he had been in doubt (presumably when commencing

suit) as to the choice of forum. Plaintiff could have brought its suit originally in the District Court below. Had the legality of the removal been questioned, plaintiff could, and presumably would, have discontinued the suit then pending in the federal court and have sued again, and—if desired—in the same District Court, which would thereby have acquired unquestioned jurisdiction. If not barred by limitation, it could presumably still sue in the court below. Plaintiff's submission to defendant's removal proceeding and the reforming of its pleadings to meet the situation was, in a not improper sense, a short cut to the same result. Save so far as implied in the direction in Martin v. Snyder, to remand a case 'reversed for want of jurisdiction,' we find no holding of the Supreme Court that a removal by a non-resident defendant—first provided for by the act of 1887-88 (and since Railway Co. v. Swan and Ayers v. Watson)—is vital to the jurisdiction of the District Court to hear the case, in the sense that the court has no discretion but to remand it, in spite of original jurisdiction to hear it and long-continued acquiescence by the parties, as well as the court's trial and decision thereunder."

* * * * * * * *

"Whether or not in the early removal cases under the statutes of 1875 and 1887-88 the term 'jurisdiction' was used less strictly than it latterly has been, there is persuasive authority tending to support a view that jurisdiction will be retained, where as here, although the case was not technically removable under the statute, the court yet had jurisdiction over the subject-matter of the controversy, and the parties had fully consented to the federal jurisdiction and acted thereunder."

* * * * * * * *

> "We think it is not our duty, upon the situation here presented, to remand the case upon our own motion and against the wishes of both parties."

In the case of *Fidelity & Deposit Co. of Maryland v. Burden,* 53 Fed. (2d) 381, where a case was removed to the Federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court, and the appellant proceeded to trial on the merits without protest, and thereafter the appellant sought to have the case remanded to the state court, the Circuit Court of Appeals for the Second Circuit said (page 381):

> "The issues presented on this appeal were disposed of in Fidelity & Deposit Co. of Maryland v. Burden, 30 F. (2d) 610, except that since our decision an application was made in the District Court to remand the case to the state court, which was denied. The cause was removed to the federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court. The appellant proceeded to trial on the merits without protest. The court below held that this was an acquiescence in the jurisdiction of the person so as to forfeit the privilege which might have existed to remand the cause to the state court. With that determination, we agree. Matter of Moore, 209 U. S. 490, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Mackay v. Uinta Co., 229 U. S. 173, 33 S. Ct. 638, 57 L. Ed. 1138; Bailey v. Texas Co., 47 F. (2d) 153 (C. C. A. 2). The other issues are affirmed on the authority of Fidelity & Deposit Co. v. Burden, *supra.*
>
> "Judgment affirmed."

In the case of *Bailey v. Texas Co.,* 47 Fed. (2d) 153, where the plaintiff brought an action in the state court and one of the defendants caused the case to be removed from the state court to the United States District Court on the ground that the action agains it was a separable controversy, and thereafter other defendants appeared in the United States District Court and the case was eventually tried in that court, and jurisdiction of the District Court was challenged for the first time on appeal from the judgment, the Circuit Court of Appeals for the Second Circuit held that the removal of the cause from the state court to the United States District Court was not authorized and was improper, but the Circuit Court of Appeals held that when a plaintiff goes to trial without asking for a remand, the cause being one of which the statute gives the court jurisdiction, the court may proceed to judgment.

To the same effect, see:

In re Moore, 209 U. S. 490;

Western Loan Company v. Butte, 210 U. S. 368;

Kreigh v. Westinghouse, 214 U. S. 249;

Arizona v. Clark, 235 U. S. 669;

General Investment Company v. Lake Shore, 250 Fed. 160;

Mellon v. International, 32 Fed. (2d) 390;

Jacobson v. Chicago, 66 Fed. (2d) 688;

Carpenter v. Baltimore, 109 Fed. (2d) 375.

There Is Substantial Evidence to Support the Findings of Fact, Conclusions of Law, and Judgment Entered in Pursuance Thereof, and the Trial Court Did Not Err in the Application of Presumptions.

It is specifically provided by Rule 52, Federal Rules of Civil Procedure (28 U. S. C. A., foll. sec. 723 C, page 677), that

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In accord with the spirit and intent of said rule, this court has held that the findings of fact made by trial courts, on conflicting evidence, are presumptively correct and will not be set aside on appeal unless they are clearly erroneous.

> *Bolander v. Godsil*, 116 Fed. (2d) 437;
> *Occidental Life Ins. Co. v. Thomas*, 107 Fed. (2d) 876.

This court has further held that in cases of this character, the judgment of the trial court, a jury having been waived, has the force and effect of the verdict of a jury, and that the judgment will not be reversed where, as here, there is substantial evidence upon which to base it.

> *Independent Indemnity Company v. Sanderson*, 57 Fed. (2d) 125.

With the foregoing pronouncements of law in mind, we now proceed to a recitation of the facts in the case at bar, in order to demonstrate to this court that the judgment and findings are amply supported by the facts shown in the record in this case.

It was admitted in the pleadings in this case that at the time and place of the accident which gave rise to this litigation, the defendant Lillian M. Hoyt was driving and operating a *Mercury* motor vehicle in an *easterly* direction along a public highway known as U. S. Highway No. 101, between its intersection with Santa Fe avenue and Alameda street in the County of Los Angeles, California, that at the time and place of said accident the plaintiff's employee, Henderson Hutchinson, while performing services growing out of and incidental to his employment with the plaintiff, and while acting within the scope of his employment, was driving and operating a *Packard* motor vehicle in a *westerly* direction on said highway between its intersection with Santa Fe avenue and Alameda street, that at the time and place of said accident the defendant Ezra S. Hoyt, Jr., was the owner of the Mercury motor vehicle driven by the defendant Lillian M. Hoyt, and that Lillian M. Hoyt was driving said automobile at said time and place with the permission and consent of Ezra S. Hoyt, Jr. It was also admitted in the pleadings that the plaintiff's said employee died on or about May 16, 1940 and left surviving him a wife, Harriett E. Hutchinson, and a son, David Keith Hutchinson, that on or about June 15, 1940 said Harriett E. Hutchinson and said David Keith Hutchinson, as the wife and minor son respectively of said employee, filed their application with the Industrial Accident Commission of the State of Califorina against plaintiff for adjustment of claim for compensation by way of a death benefit and on or about July 22, 1940 said Commission duly made its award in favor of Harriett E. Hutchinson and David Keith Hutchinson and against the plaintiff of the death benefit in the total sum of $6,150.00, that said award

has since and prior to the commencement of this action become final, and that by virtue of said award the plaintiff has now become obligated to pay to the said wife and son of plaintiff's employee the sum of $6,150.00 as compensation for the death of said employee. It was further admitted in the pleadings that the plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California, that more than two years prior to the commencement of this action the plaintiff duly and regularly secured from the Industrial Accident Commission of the State of California a certificate of consent to self-insure, that at all times material to this action said certificate was and now is unrevoked, and that plaintiff was and now is a self-insurer under and by virtue of the provision of the Labor Code of the State of California. [See Tr. pp. 2-17, incl.]

It is important to note that in her cause of action set forth by way of cross-complaint herein, Lillian M. Hoyt specifically alleged that at the time and place of the accident she was driving and operating a *Mercury* motor vehicle in an *easterly* direction on said highway and the decedent, Henderson S. Hutchinson, was driving and operating a *Packard* sedan in a *westerly* direction on said highway. [Tr. pp. 12, 13.]

Therefore, it will be seen that there was no dispute as to who the drivers of the cars were, nor was there any dispute as to the direction in which each car was traveling on the highway.

Robert C. Danielson, a police officer, testified that the accident occurred at a point which was 200 feet away from the nearest curve in the road. [Tr. p. 92.]

The disinterested witness, Lenton Finton, testified that he saw the Mercury car (driven by Mrs. Hoyt) suddenly swerve to the center line of this broad highway and strike the Packard car which was being driven by decedent and was approaching from the opposite direction. [Tr. pp. 102, 103.]

Finton was riding in a car being driven by one Francis Hoffman, traveling in an easterly direction on the highway behind the Mercury in the most southerly lane of this four lane highway, and Finton testified that he could see no reason why Mrs. Hoyt suddenly swerved the Mercury to the center of the highway. There was no parked car or obstruction of any sort in the south lane of the highway which would have required her to change the course of her car. [Tr. pp. 102, 103, 106.]

Mr. Hoffman also testified that the accident occurred on the center line of the highway although the Mercury had been traveling in the south lane of the highway until a moment prior to the impact. [Tr. pp. 108, 111.]

Finton testified that the two automobiles came to rest on the double center line of the highway, with the Mercury sitting cater-corner across the highway, and the Packard sitting more broadside to the road. It appeared to him as though the right side of the Mercury struck the right side of the Packard. [Tr. pp. 103, 104.]

Officer Danielson testified that this was a four lane highway, with a double line painted in the center of the highway, and that he found forty-eight feet of skid marks made by the Mercury starting from the south lane of the highway and continuing to the point of impact. [Tr. pp. 73, 75, 76; *see map,* introduced in evidence

as Joint Exhibit No. 1, and *photograph*—introduced in evidence as Plaintiff's Exhibit 1—Tr. p. 73.]

This officer further testified that he found the right front portion of the Mercury on the center line of the highway and the rest of the car north of the center line a distance of three or four feet. [Tr. p. 95.] He found that the entire front end of the Mercury was smashed in like an accordion, but there was no damage to the front of the Packard or to the left side of the Packard. The Packard was damaged from the front to the rear on its right side. [Tr. pp. 79, 80.] There was an area of debris and oil all across the center line, but there were no marks on the south side of the highway except those made by the Mercury. [Tr. p. 90.] The Packard had not left any marks indicating that its brakes had been applied, but there were some brush marks on the pavement north of the center line. These brush marks were fifteen feet in length, made by the rear wheels of the Packard in swinging from the northwest direction to the south. [Tr. pp. 88, 89, 90, 94.] The Packard was headed in a southeast direction when it came to rest after the impact. [Tr. p. 77.]

The witness Florence Hastings admitted that she noticed oil marks north of the center line of the highway. [Tr. p. 117.]

Mrs. Hoyt testified that she had no recollection of the accident. [Tr. p. 121.]

Dr. W. W. Horst, who was in charge of the Wilmington Emergency Hospital, testified that Mrs. Hoyt was seen by him at said hospital after the accident, and that she had an alcoholic breath. [Tr. pp. 60, 61.] Gladys Stewart, sister-in-law of Mrs. Hoyt, testified that Mrs.

Hoyt had drank one bottle of beer about four or five hours prior to the accident and had drank another bottle of beer about two and one-half or three hours before the accident and had then left her presence. [Tr. pp. 139, 140.] Whether or not Mrs. Hoyt had anything further to drink, or what her activities were, during the last two and one-half or three hours prior to the accident is unknown to anyone, but it is perhaps significant that although this accident occurred at about 4:30 P. M. and Mrs. Hoyt was due home soon, to take care of her children who were arriving home from school at that time, and to prepare dinner for her husband, she was five or six miles away from her home at the time of the accident and was traveling in the opposite direction from her home at the time. [Tr. pp. 155-160, incl.]

From the foregoing recitation of facts it will readily be observed that the deceased and the defendant Mrs. Hoyt were approaching each other from opposite directions and that their automobiles were involved in virtually a headon collision. After the impact the deceased's automobile was found to be entirely upon its own side of the road, while the greater portion of the defendant's automobile was found to be likewise upon the deceased's side of the road. Up to the point of impact there ran forty-eight feet of skid marks leading from the defendant's extreme right hand edge of the road over onto the deceased's side of the road. The record fails to disclose the slightest excuse or reason for the action of Mrs. Hoyt in suddenly driving her car from the extreme south side of the highway over onto the north side of the highway where the deceased was driving his car, unless the liquor which she had been drinking had so affected her as to cause her to lose control of the car. The fact that she

was traveling away from her home, rather than toward it, at a time when she should have been going toward it, and without any explanation from anyone as to why she was going in the opposite direction, might lead to the assumption that perhaps she was not at all in possession of her proper faculties at the time of the accident.

This simple factual picture leaves no doubt as to where the responsibility lies for this accident. The non-legal mind would find in it no subject for argument. It is not necessary to have reference to law governing presumptions in order to interpret such evidence as this. The only question seems to be whether there exists any legal underbrush in which a trial judge is required, as a matter of law, to obscure the plain facts. It is respectfully submitted that no such legal impediment to judicial thought exists in this case. The appellants make reference to certain testimony given by the witness Florence Hastings, but it must be remembered that Florence Hastings was a witness for the appellants, and the most that could be said for her testimony is that it creates a conflict in the evidence. Inasmuch as the conflict, if any, was resolved in favor of the appellee, her testimony becomes unimportant. Furthermore, her testimony was not of much value, because she was two-tenths of a mile away at the time of the accident and was not in as good a position to observe the true situation as were the other witnesses.

Upon the foregoing evidence, the trial court made a finding as follows:

> "The Court finds that it is true that at the said time and place the defendant Lillian M. Hoyt negligently operated, controlled and directed the said Mercury automobile so as proximately to cause the same

to swerve to her left-hand side of said highway and to collide with the automobile driven by the said Henderson S. Hutchinson inflicting upon the said Henderson S. Hutchinson personal injuries which proximately resulted in his death on or about May 16, 1940." [Tr. p. 42.]

The court made a further finding, based upon said evidence, as follows:

"The Court finds that it is not true that the plaintiff's employee, Henderson S. Hutchinson, did not exercise ordinary care or caution or prudence at the time and place of said accident or in an effort to avoid said accident and that it is not true that the injuries sustained by the said Henderson S. Hutchinson or his death were directly or proximately caused or contributed to by any fault, carelessness or negligence on the part of the said Henderson S. Hutchinson; that it is not true that the said Henderson S. Hutchinson was careless or negligent in any respect; that the sole proximate cause of the accident and the death of the said Henderson S. Hutchinson was negligence on the part of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr." [Tr. p. 45.]

To summarize the evidence, the findings and judgment in this case find ample support in the following facts:

1. The deceased and the defendant Lillian M. Hoyt were approaching each other from opposite directions and were involved in virtually a head-on collision.

2. After the impact the deceased's automobile was found to be entirely upon its own side of the highway, whereas the greater portion of Mrs. Hoyt's automobile was likewise found to be upon the deceased's side of the road. [See photograph—Plaintiff's Exhibit 1.]

3. Up to the point of impact there ran forty-eight feet of skid marks leading from the defendant's extreme right hand edge of the road over to the deceased's side of the road, and these marks were as straight as if laid out by surveyors' instruments, proving conclusively that they were made before the terrific collision occurred. [See photograph—Plaintiff's Exhibit 1.] They marked unmistakably the course of the defendant's vehicle over the center line of the highway *before the impact.* A disinterested eye witness following behind the defendant's automobile saw it swerve along the route of these skid marks, removing all doubt as to which car made them.

4. There is not the slightest evidence of the collision having occurred upon the defendant's own side of the highway.

5. All of the marks and debris prove that the accident occurred upon the deceased's side of the road.

6. The testimony and the physical facts prove conclusively that the defendant was on the wrong side of the highway at the time of the collision, and no excuse or explanation therefor is shown in the record.

In addition to the foregoing evidence, the findings and judgment find support in the legal presumption that the deceased exercised ordinary care for his own concern and obeyed the law.

Westberg v. Willde, 14 Cal. (2d) 360.

The *Westberg* case settled, once and for all, the California law upon this subject. In that case, which was a death action, the plaintiffs called three eye witnesses who described the occurrence of the accident in considerable detail, yet the Supreme Court of California held that

the presumption of exercise of ordinary care on the part of the deceased was applicable. At pages 367-8 the Supreme Court of California said (emphasis added):

> "We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence. from a situation where the acts and conduct of a *decedent* are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him, but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. (Tuttle v. Crawford, 8 Cal. (2d) 126, (63 Pac. (2d) 1128); Rogers v. Interstate Transit Co., 212 Cal. 36, 38, 39 (297 Pac. 884).) But in the other situation, where

> the acts and conduct of *a deceased person* are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case. *An instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court, in an unbroken line of decisions, has sustained the giving of such an instruction.* (Ellison v. Lang Transp. Co., *supra.*)"

At page 365 the Supreme Court of California pointed out that the rule is firmly established in California that

> "a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence."

It is apparent, from the decision in the *Westberg* case, that there is a material difference between an action involving a living person on the one hand and one involving a deceased person on the other, although the same presumption has been applied if they were living plaintiffs. In any event, it is essential to the destruction of the presumption, as a matter of law, that the party relying thereon should have destroyed it completely and unequivocally. Certainly, none of the evidence introduced on behalf of the *appellee* destroyed the presumption existing in favor of the decedent in this case, and the evidence introduced by the appellants was not such as to overcome or destroy this presumption.

On the other hand, with respect to the claim of appellants that Mrs. Hoyt was likewise entitled to invoke the application of a presumption of due care in her favor,

we respectfully submit that the physical facts and the testimony of the witnesses overcame and dispelled any such presumption which might have existed in her favor. The evidence showed without contradiction that Mrs. Hoyt suddenly swerved her automobile from her own right hand edge of the highway over onto the left side thereof and collided with another car which was in its proper position on its own side of the road.

It is respectfully submitted that the judgment of the trial court in this case is supported in every respect by the evidence. In fact, it is difficult to perceive how any other conclusion could be drawn. The appellee's case does not depend alone upon the indulgence of a presumption in favor of the deceased, although the law warrants and dictates that the presumption should be indulged in his favor. The judgment finds ample support in the facts actually proved, without reference to any presumption. The evidence affirmatively shows that the deceased was struck while upon his own side of the road, by a sudden and unexplained movement on the part of the automobile driven by Mrs. Hoyt. *There is a total absence of any evidence that the accident was in any way contributed to by any action on the part of the deceased.* It is merely as an added foundation of the court's findings that the presumption applies. The appellants' attack upon that presumption is in the nature of an attack upon a straw man erected by the appellants themselves. *With or without the presumption, the finding of the trial court stands supported by ample testimony.* The finding of the trial court that Mrs. Hoyt was negligent is supported by the authorities cited by the appellants but directed toward the deceased in the erroneous assumption that it was the de-

ceased rather than the defendant who was upon the wrong side of the road.

The fact that the defendant Mrs. Hoyt drove her automobile onto the wrong side of the highway constitutes prima facie proof of negligence, and such prima facie proof operated in law to cast the burden on appellants to explain how Mrs. Hoyt drove her automobile to the wrong side of the highway without want of care on her part. No such explanation is shown in the record. In fact, there is no explanation whatsoever in the record as to why she drove her car to the wrong side of the road. In a similar situation, the District Court of Appeal of the State of California said, in the case of *Trowbridge v. Briggs,* 140 Cal. App. 554, at page 557 (Italics ours):

> "At the time of collision, appellants were operating their automobile on its wrong side of the highway, meeting in a 'head-on' collision with that of respondent Trowbridge and wife, which machine the evidence revealed was at the time being operated on its right side of the highway at a prudent and careful speed. This constitutes negligence of a *prima facie* character, sufficient in itself to overcome the motion for nonsuit. In Lawrence v. Goodwill, 44 Cal. App. 440, 449 (186 Pac. 781), it is stated: 'In other words, the fact that the driver of a vehicle has taken the wrong side of the highway when meeting or overtaking another where damage occurs is not conclusive, but only *prima facie* evidence of negligence which may either stand as proof of the fact or be overcome or rebutted by the circumstances of the particular case.' *Herein such prima facie proof operated in law to cast the burden on appellants to explain that they drove their automobile to the wrong side of the highway without want of care.*"

Appellants *argue* that Mrs. Hoyt's car was not on the wrong side of the highway at the time of the accident, but the *fact* remains that the trial court's findings show that the trial court took a different view of the situation [Tr. p. 42], and the authorities cited by the appellants to the effect that operation of an automobile on the wrong side of the highway when there is no necessity therefore, constitutes negligence *per se* are applicable to the wrongful action of Mrs. Hoyt in suddenly swerving her car from the south side of the highway to the center line of the highway and crossing said center line to collide head-on with a car approaching from the opposite direction. The *arguments* advanced by the appellants are based merely upon their own *conception* of the evidence, and it is apparent that the trial court disagreed with their conception of the evidence. *The appellants offer nothing other than mere argument in an effort to account for the undisputed evidence of the lengthy skid marks left by Mrs. Hoyt's car, extending from the south side of the highway across the center line of the highway, nor do they offer anything other than mere argument in an effort to overcome the effect of the undisputed testimony of the disinterested eye witnesses to the effect that Mrs. Hoyt suddenly swerved her car from the south side of the highway to a point across the center line of the highway.*

The cases cited by appellants in support of their contention that the presumption that the deceased exercised ordinary care and obeyed the law in this case was dispelled by the evidence, are not applicable, for the reason that there was no evidence in this case which rebutted the presumption by being uncontradicted, wholly irreconcilable with the presumption, and not the result of mistake or inadvertence. The cases referred to by the appellants

hold that if the evidence produced by the prevailing party is neither uncontradicted nor wholly irreconcilable with the presumption, the presumption is not destroyed. The cases cited by the appellants also show that it is essential to the destruction of the presumption, as a matter of law, that the party relying thereon should have destroyed it completely and unequivocally *by his own evidence.* With this rule in mind, it is respectfully inquired by appellee, what is the evidence which appellee is supposed to have introduced in the case at bar which is wholly irreconcilable with the presumption that the deceased exercised ordinary care? Appellee read into evidence the testimony of two witnesses, Lenton Finton and Francis H. Hoffman, and appellee also called as a witness police officer Robert C. Danielson. *None of these witnesses testified to any fact or circumstance which was inconsistent with the physical facts.* The only testimony given by Mr. Hoffman which bore upon the manner in which the accident occurred, and the only testimony referred to by appellants, was as follows (App. Op. Br. p. 12):

> "Q. Could you tell where the impact occurred in reference to the center line of the highway? A. I would say it was *just about right where they were at,* right on the center line."

"Just about right where they were at" in this case happens to be upon the deceased's side of the road. Appellee perceives in this testimony support of the court's judgment rather than an impeachment thereof. The marks left by the appellants' automobile prove that it had crossed the center line onto the deceased's half of the road before the impact occurred.

The witness Lenton Finton testified that he saw the defendants' car swerve suddenly from its own right-hand edge of the highway over to the center line along the exact course where the skid marks were found. The only portion of the testimony given by this witness which is relied on by defendants, as set forth in their brief, is as follows (App. Op. Br. p. 12):

> "Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. The Packard; when they got stopped, the Mercury was setting on that white line, or practically over it, *but as near as I could tell* from watching, she did not go across that double white line."
>
> * * * * * * * *
>
> "Q. And at the time of the impact, the Mercury was definitely south of the center white line? A. Yes sir."

It is obvious that the foregoing testimony does not even tend to rebut the presumption that the deceased had exercised ordinary care. This witness saw the car driven by Mrs. Hoyt swerve, and his testimony was manifestly material and important. *This witness never saw the deceased's car at all. ("Q. Did you see the Packard before the impact? A. No sir, the first I seen it was when she hit him.")* [Tr. p. 104.] He was behind Mrs. Hoyt's car, and the rear thereof was consequently more visible to him. He said "as near as I could tell" the car driven by Mrs. Hoyt did not go across the double white line. *He also said that the deceased never crossed the double white line,* explaining "that is hard to tell, she hit him so quick, I would say that he wasn't . . .", *but it is a known fact that the defendant did cross over the double*

center line. There cannot be any dispute on this subject. Not only was Mrs. Hoyt's car photographed on the wrong side of the road immediately following the accident but the perfectly straight marks leading up to it crossed over the center line several feet and were clearly made before the terrific collision occurred. [See photograph—Plaintiff's Exhibit 1.] As previously noted, they were as straight as a ruled edge and of necessity were made before being interrupted by the terrific impact. It is, therefore, manifest that a witness who states that *"as near as I could tell* from watching, she did not go across that double white line" is mistaken. It is seldom that witnesses to an accident observe and remember every detail. In fact, a witness who seems to do so is subject to justifiable suspicion. *This particular witness saw the defendant swerve sharply toward the deceased's half of the highway. In the rapidity of subsequent events he did not notice that she crossed the center line, but it is a known fact that she did.*

It is obvious that the testimony of this witness did not refute the presumption and is not even inconsistent therewith. He does not claim to have seen the driver on whose behalf the presumption is invoked at all. His testimony confirms the presumption, for it confirms the known physical facts, and his evidence was introduced for that purpose. It cannot seriously be contended that his testimony was either "uncontradicted" (for in the essential particular it is contradicted by the conclusively known physical facts) or that it is "wholly irreconcilable" with the presumption. Instead, his statement that the defendants' car, as far as he could tell, did not cross the center line is obviously an innocent mistake attributable to the infirmities of human observation where events occur rapidly

and under exciting circumstances. The law would be deficient in intelligence if it were incapable of reconciling known facts with such slight errors of human testimony.

The only other witnesses called by the plaintiff were the physician and the police officer, Robert C. Danielson. The physician was called to prove that the defendant had been drinking, and he gave no testimony as to the manner in which the accident occurred. Certainly it cannot be contended that the testimony of the police officer destroyed the presumption, for his evidence confirmed the physical facts. *It cannot seriously be contended that any of this evidence either destroyed or conflicted with the presumption that the deceased had exercised ordinary care. It established eccentric behavior on the part of the defendant, her course over the center of the highway before the impact, and the presence of the deceased where he belonged both at the time of the collision and thereafter.*

So far as the witness Florence Hastings is concerned, her testimony is extraneous to this discussion. She was not called as a witness for the appellee. The appellants introduced her testimony themselves and it cannot be contended that the appellee is bound thereby. However, there is nothing in her testimony inconsistent with the presumption of due care on the part of the deceased or requiring the trial court, *as a matter of law,* to blind itself to the plain facts. *This witness never saw the defendant at all.* She said she saw the deceased swerve to his left until he straddled the center line, for the purpose of passing another car. It may be that the deceased swerved to his left somewhat for the purpose of avoiding the defendant, who was heading toward his path at a speed of forty-five miles per hour, and that the witness was mistaken as to his

motive in so doing. She admitted that the car which she thought the deceased was passing was in the right-hand, outer lane, and she admitted that there would exist no reason for the deceased to swing wide in passing it. [Tr. p. 115.] The physical facts, however, prove conclusively that the impact occurred upon the deceased's half of the highway and it is evident that any observations of this witness inconsistent therewith are attributable to her extreme distance from the scene of the accident. *She was 2/10 of a mile (1056 feet) away, and a curve intervened between herself and the impact.* [Tr. pp. 113, 114.] *In any event, to reiterate, her testimony was not introduced by the plaintiff and there is no basis for the argument that by virtue thereof the plaintiff rebutted the presumption.*

It is earnestly submitted that when physical facts are clear and unequivocal, when they are established by disinterested and reliable evidence, they are often more trustworthy than the recollection of human witnesses who are subject to errors of observation and memory. In this case the physical facts are known, and the eccentric behavior of the defendant was established by an eye witness. *From the foregoing it is apparent that the finding of the court that the deceased was not guilty of contributory negligence was supported and dictated by the record. In the first place, it is required by total absence of any evidence that the deceased was guilty of contributory negligence. In the second place, it is supported and dictated by the legal and unrebutted presumption.*

The finding of the court that the defendants were guilty of negligence which was a proximate cause of the accident is supported and dictated by the authorities cited by the

defendants in their brief. Proceeding upon the erroneous premise that the deceased rather than the appellant Mrs. Hoyt was upon the wrong side of the road, the appellants have cited and quoted from certain authorities holding that the unexplained presence of a vehicle upon the left side of the road is negligence *per se*. Appellee takes the liberty of repeating the same citations and quotations contained at page 16 of appellants' opening brief. They are as follows:

> "As the court says in *Olson v. Meacham,* 129 Cal. App. 670, 19 P. (2d) 527:
>
> " 'In this case, driving on the wrong side of the road when there was no necessity therefor constituted negligence.'
>
> "In the case of *Surtleff v. Wyns,* 114 Cal. App. 653, at 655, the court says (300 P. 890):
>
> " '. . . The operation of the car on the left hand side of the highway itself constituted negligence *per se.*' "

In addition the appellee again directs attention to the late case of *Trowbridge v. Briggs,* 140 Cal. App. 554, at page 557 (*supra*).

There is, therefore, complete harmony between the litigants in this case as to the *law*. It is established in appellants' own brief that to be upon the left-hand side of the road, unexplained, is negligence *per se,* and will support a judgment accordingly. The argument is made by appellants in the erroneous assumption that it was the deceased who occupied this unlawful position upon the high-

way. In fact, however, the conclusion is unmistakably as drawn by the court, that it was Mrs. Hoyt and not the deceased who was upon the wrong side of the highway and against whom these authorities must be applied.

Lastly, it is contended by defendants that they are entitled to the same presumption of due care because the memory of the defendants' driver is said to have been destroyed. The case of *Hoppe v. Bradshaw*, 42 Cal. App. (2d) 344, is cited by appellants. It is not disputed that the same presumption is applicable in the case of amnesia as in the case of death, if the court is convinced that amnesia did occur, but the fact that a presumption exists does not compel a court, *as a matter of law,* to act thereon *when there is contrary evidence.* In the *Hoppe* case a directed verdict for the defendant was reversed, not because the court was *required* to accept the presumption in lieu of contrary evidence, but because it was a jury trial and the court refused to permit the jury to *weigh* the presumption in the light of the evidence. As stated by the Supreme Court of California, in *Smellie v. Southern Pacific Co.,* 212 Cal. 540, at page 212, after declaring the existence of the presumption:

> "This is undoubtedly true, but it does not necessarily follow that the presumption may not be overcome or 'dispelled' as a matter of law by proof of the party against whom the presumption is invoked."

In the case at bar the defendant driver might have entered the court room with a presumption in her favor born of the absence of evidence to the contrary. When she left

the court room, however, it had been proved that she had suddenly turned from her own right-hand edge of the highway over onto the left side thereof and collided with another driver who was in his proper position on the road. If it were to be held that under such circumstances a trial court is *required* as a matter of law to accept the presumption and ignore the evidence, law suits would be decided solely on presumptions and every case would be stalemated. It is obvious that legal presumptions are not designed to emasculate and overrule proof to the contrary.

The same observations are true as to *Scott v. Sheedy,* 39 Cal. App. (2d) 96, also cited by appellants.

Conclusion.

In conclusion, we respectfully submit that the United States District Court had jurisdiction to try this cause and render judgment herein, that the appellants waived any right which they may have had to obtain an order remanding the case to the State court, and that the evidence amply supports the findings and judgment. We earnestly urge that the judgment be affirmed.

Respectfully submitted,

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